IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-08-03-1247 thru IN-08-03-1274
	)	IN-08-03-1281, IN-08-03-1282, and
JAMES HARDWICK	)	IN-08-03-1245
	)	
Defendant	)	ID No. 0709006233

Submitted: January 25, 2011
Decided: March 10, 2011
Re-Issued: June 7, 2011

MEMORANDUM OPINION

Upon Motion of Defendant for Post Conviction Relief
- ***DENIED***

Appearances:

James Kriner, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for State of Delaware

Andrew Witherell, of Wilmington, Delaware, Attorney for Defendant James Hardwick

HERLIHY, Judge

James Hardwick has moved for Postconviction relief. He was convicted of 29 counts of rape in the first degree and two counts of attempted rape in the second degree. He was sentenced to thirty-one life sentences. As a result of a prior rape conviction of a step-daughter in Pennsylvania, Hardwick's sentences for first degree rape were enhanced to life imprisonment. The sentences for the two first convictions of rape second were enhanced to twenty-five years to life.[1] His convictions were affirmed.[2]

Hardwick's motion, originally *pro se*, raises a number of grounds to support his claim for relief. The Court appointed new counsel for Hardwick who declined the Court's invitation to modify the claims, if needed, after consultation with Hardwick.[3] For organizational purposes, the Court will not detail them here but will list each claim, his trial counsel's response, the State's response and Hardwick's response to the latter two.

Factual Background

The twenty-nine counts of rape in the first degree involved two underage females who were twelve and thirteen at the time. One of the counts of attempted rape involved one of the females and other count involved a potential but not a real victim, which will be discussed in the context of the evidence. As the Supreme Court did in its affirmance,

---

[1] 11 *Del. C.* § 4205A. The Court chose to impose life on those two convictions.

[2] *Hardwick v. State*, 971 A.2d 130 (Del. 2009).

[3] Counsel was appointed shortly after Hardwick filed his original motion but indicted only on January 21, 2011 - after some prodding - that he would not be filing anything in addition to Hardwick's *pro se* filing.

this Court will use pseudonyms; the same two as the Supreme Court did.[4]

Alice Smith was born on June 21, 1993. Her mother "met" Hardwick online on December 13, 2003, and personally met him January 2, 2004. He was 44 at that time. They married on February 19, 2004. Hardwick had a teenage nephew, Matthew Hardwick, who lived from time to time at the Smith/Hardwick residence. One of Alice's friends was Peggy Lane who was born on April 11, 1992. The families knew each other through church and a swimming pool.

The first nine counts of the indictment charged rape first degree involving Alice occurred during the period February 1, 2004 and September 5, 2007.[5] She testified that Hardwick performed oral sex on her over a period of time. He threatened her in various ways to keep her from telling her mother.

These acts were apparently different from what turned out to be the major precipitating event setting in motion all that followed. In the summer of 2005, Peggy was

---

[4] *Hardwick* at 131.

[5] All ten read the same; an example is:

COUNT 1. A FELONY

RAPE FIRST DEGREE, in violation of Title 11, Section 773 of the Delaware Code of 1974, as amended.

JAMES HARDWICK, on or between February 1, 2004, and September 5, 2007, in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with (Alice Smith), a child who has not reached her 16th birthday and the defendant was in a position of trust, authority or supervision over the child, and the defendant was more than four years older than said victim.

over at Alice's home for a sleep over. Late in the evening, Hardwick was watching some pornographic material on a PC. He either called the two girls, then twelve and thirteen, over to him or they got curious about what he was viewing and went over to him. After watching it a while, he asked them if they would like to learn to do what was showing on the PC. The three went down to the basement where he showed them Playboy magazines.

In the basement, Alice and Peggy read several issues of Playboy which Hardwick gave them. He again asked if they would like for him to "teach" them what they had seen. The sexual acts involving all three began. All were eventually naked. Some of it was inside a dog cage. There were various forms of sexual acts vaginal, anal, and oral. Alice and Peggy participated.[6]

Later in the same week, the two girls and Hardwick went to a location in Delaware City. Matthew Hardwick was there, too, as was Peggy's sister, Kay.[7] Kay and Alice went out on an errand. Hardwick, Matthew and Peggy engaged in sexual acts, including Hardwick and Peggy having anal intercourse; she was thirteen when this occurred. There were other incidents of sexual intercourse on other visits to the place in Delaware City.[8]

---

[6] Most of the details of this incident and subsequent ones came from the testimony of Peggy and her "3507" statement to the police. Alice either had blocked out most of the events, including this one in the basement or said she could not recall. She denied, to a degree, the amount of participation in the activities inside the dog cage.

[7] A pseudonym.

[8] "Sexual intercourse" means any act of physical union of a person's genitalia or anus with another person's mouth, genitalia or anus. Ejaculation is not required. "Sexual intercourse" (continued…)

Most involved Hardwick, a few involved Matt, according to Peggy. There was oral sex by Hardwick on Peggy and vice versa, but she never saw Hardwick and Alice engage in anal intercourse. There were other incidents where, according to Peggy, Hardwick, Matt, Alice and she were engaging in various kinds of intercourse and oral sex. There were many occasions of "foursomes," which Peggy said ended in April or May 2006.[9]

Peggy said Hardwick used pornography as a precursor to their sexual experiences. He referred to them as "lessons." She told the police she had vaginal intercourse with Matthew on a lot of occasions, when she testified he knew her age, as well as with Hardwick. She and Hardwick went to his place, apparently an office, in Delaware City on several occasion and each time there was sex.

Twenty-two of the Counts involved the charge of rape first degree involving Peggy.[10] Peggy testified there were six to eight occasions of anal sex and twenty to thirty

---

[8](…continued)
occurs upon any penetration, however slight. The term "sexual intercourse" also includes any act of cunnilingus or fellatio, regardless of whether penetration or ejaculation occurs. "Cunnilingus" means any oral contact with the female genitalia. "Fellatio" means any oral contact with the male genitalia. Within the meaning of this offense, "sexual intercourse" encompasses the crimes commonly known as rape and sodomy. Jury Instructions dated June 3, 2008.

[9] The Court gave a "Separate Acts" instruction. *Feddiman v. State*, 558 A.2d 278, 288-89 (Del. 1989).

[10] For example Count 11 read:

COUNT 11. A FELONY

RAPE FIRST DEGREE, in violation of Title 11, Section 773 of the Delaware Code of (continued…)

occasions of vaginal sex with Hardwick. She recalled that the number of occasions of oral sex was around twenty times.

For a while, Peggy and Matt became "boyfriend" and "girlfriend." It had started in May 2005 and at various times broke off, finally ending in January 2007. Matthew did not testify at trial.

Peggy first talked to a church counselor about all of this and, then shortly thereafter, spoke to Det. Andrew Rubin of the Newark Police Department on July 11, 2007. After some discussion with Peggy and her parents about Peggy making a pretext phone call to Hardwick, Peggy called Hardwick. They spoke to each other three times over two days on August 28 and 29, 2007, the first call being from Peggy to him on his cell phone. All were recorded with her parents' consent. The police gave her "talking points." She described her boyfriend's unsatisfactory (alleged) attempts at oral sex to which he asked if she wanted a "refresher" course. The idea, he said, was to get her as "hot" as she could be.

---

[10](…continued)
1974, as amended.

JAMES HARDWICK, on or between April 11, 2005, and August 30, 2006 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with (Peggy Lane), a child who has not reached her 16th birthday and the defendant was an invitee or designee of a person who stand in a position of trust, authority or supervision over the child, and the defendant was more than four years older than said victim.

Hardwick asked Peggy when she wanted to do it. She asked if she could bring a friend (there was no "friend" who was going to be there). He asked Peggy if she remembered Delaware City. He said she needed to be really aroused and have energy to do anal intercourse. He spoke to her of past acts of oral sex on him and how she had been rewarded. Hardwick said the girlfriend Peggy was bringing had to be trusted. Peggy said she was fifteen and Hardwick said that was okay.

They set up a meeting in front of a store at Peoples' Plaza in Glasgow at 10:00 a.m. on September 5, 2007. Hardwick showed up as arranged. He was arrested. When searched the police found a condom in his pants pocket. They recovered a cell phone with the same number Peggy had called in late August.

Hardwick was indicted on November 26, 2007. His first case review was January 28, 2008, and his final case review was on May 19, 2008. He went to trial on May 28, 2008 and the jury's verdict was on June 3, 2008. As noted, after sentencing, he appealed and his convictions were upheld.

Discussion

I

Before undertaking consideration of the issues Hardwick raises in his current motion, the Court is required to determine if there are any procedural impediments to

doing so.[11] The mandate was issued May 8, 2009. His motion was filed June 16, 2009.[12] Hardwick's current motion was timely filed. Counsel was appointed in July 2009 to represent him on his motion. There is a procedural bar, however, to Hardwick's first ground for relief, namely that the Court erred in several of its instructions to the jury. One error now claimed is in regard to the instruction on unanimous verdict and the other involves the Court's instruction on witness credibility.

On appeal, Hardwick, however, argued only that the Court erred by not giving a missing witness instruction covering Matthew Hardwick's non-appearance at trial. Hardwick's motion makes several claims of ineffective assistance of counsel relating to Matthew's non-appearance which are discussed later.[13] His claim of erroneous jury instructions on the two above issues was not raised on appeal but could have and should have been and is, therefore, barred.[14] To overcome that procedural bar, Hardwick has to

---

[11] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

[12] Super. Ct. Crim. Rule 61(i).

[13] *Infra.* pp. 10 - 13.

[14] Super. Ct. Crim. Rule 61(i)(3); *Guinn v. State*, 882 A.2d 178, 182 (Del. 2005).

show cause for relief and prejudice.[15] He cannot and has not offered anything to address either prong.[16] Hardwick's claim of erroneous jury instructions is procedurally barred and

---

[15] *Id*.

[16] His argument, nevertheless, lacks merit. On the unanimous verdict claim he argues the Court gave no leeway to the jury to find a reasonable doubt. The Court's standard instruction was:

> FURTHER FUNCTION OF THE JURY
>
> I have already informed you of certain duties. You also have a duty to consult with one another and to deliberate with an open mind and with a view to reaching a verdict. And as you know, all twelve jurors must unanimously agree to the jury's verdict. Each of you should decide the case for yourself but only after impartially considering the evidence with your fellow jurors. And in the course of deliberations, do not hesitate to re-examine your first impression or to change your opinion if you are convinced by the discussions. However, you should not surrender your own opinion as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict. You are officers of the court and must act impartially, that is without favoring either side but based on the evidence and with a desire to declare the proper verdict.

Hardwick did not refer in his argument to the Court's "Conclusion":

> Now, upon retiring to the jury room, I suggest that you carry on your discussions in an orderly way and give everybody an opportunity to express their views before taking a vote or attempting to decide the case. All the issues should be fully and fairly discussed and everyone should have a fair chance to be heard and participate. As I mentioned, all twelve jurors have to unanimously agree to your verdict.
>
> * * * * *
>
> However, if you do not find that all of the elements of the crime charged in a particular count have been proved beyond a reasonable doubt, or if you have a reasonable doubt concerning the guilt of the defendant as to a particular count, then your verdict must be "Not Guilty" of that count. Each verdict must be unanimous.

He selects from the Court's standard credibility instructions two isolated phrases. Those phrases are underlined in the complete credibility instruction given:

(continued…)

he has not shown why he entitled to relief from that bar.

II

The balance of Hardwick's motion is a laundry list of claims of ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel Hardwick must show that his lawyer's conduct fell below an objective standard of reasonableness and but for counsel's conduct, there is a reasonable probability the outcome of his trial would have been different.[17] Defense counsel's actions are entitled to a strong presumption that they were professionally reasonable.[18] When evaluating a claim of ineffectiveness, the Court must strive to eliminate the "'distorting effects of hindsight'."[19]

---

[16](…continued)
CREDIBILITY OF WITNESSES AND CONFLICTS IN TESTIMONY

You are the sole judges of the credibility of each of the witnesses and the weight of the evidence. In weighing the testimony of any witness, you may consider the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness might have, whether the testimony is consistent with the witness' earlier statements, with other evidence or with common experience, and anything else bearing on believability. You need not believe any witness even though the testimony is uncontradicted. You may believe all, part or none of the testimony of any witness.

If you should find the evidence from any of the witnesses to be conflicting, you should try to harmonize it. However, if you cannot do that, it is your privilege as the judges of the facts to accept that part of the testimony that you conclude is more credible and to reject any part that you do not consider as credible.

[17] *Johnson v. State*, 813 A.2d 161, 165 (Del. 2001).

[18] *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002).

[19] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997) quoting *Strickland v. Washington*, 466 (continued…)

Failure to Produce Alibi Witnesses

Hardwick asserts that trial counsel failed to have two alibi witnesses testify at trial. One is apparently Marlene Ciehoshi. His motion lacks her name and is vague about her; trial counsel uses her name in response to Hardwick's motion. Hardwick says she would have testified when the alleged events occurred and would have provided an alibi. Trial counsel indicates an investigator interviewed her but that she could not recall dates sufficient to provide an alibi. Trial counsel chose not to have her testify. Hardwick's response to counsel's reply did not address this witness or what trial counsel said.

The other alleged alibi witness whom Hardwick faults counsel for not producing is his nephew, Matthew. There is no question Matthew did not testify. His absence was an issue raised at trial.[20]

---

[19](…continued)
U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984).

[20] Court: While we're waiting, (trial counsel), I have seen the e-mails regarding Mr. Pankowski's appointment to represent Matthew Hardwick. Have you heard any more from Matthew Hardwick, anything else like that?

Trial Counsel: I have not heard anything more concerning him. Frankly, I do not expect him to appear, in discussing - - from discussing his situation with the defendant's mother, who was going to bring him down to testify. He lives in Pennsylvania.

There's another issue that's come to my attention since the trial started that I did want to discuss with the Court prior to one of the State's witnesses testifying.

Court: All right. Why don't we hold off on that.

Trial Counsel: Okay. But I did exchange e-mails with Mr. Pankowski this morning. He
(continued…)

Trial counsel told the Court he had given a subpoena to Matthew. Apparently, it was not the kind of subpoena enforceable across state lines.[21] As the Supreme Court

---

[20](…continued)
said he will be on call tomorrow morning if I need him. He can come right down to the courthouse, so - - but I have no way of getting in touch with Matthew Hardwick.

* * * * *

Trial Counsel: I'll tell him that.

The other thing, I understand, after the break, the State is going to call [Alice's mother] to the stand to testify. And as I had mentioned previously, there was - - an attempt was made by the defense to secure the appearance of Matthew Hardwick as a possible witness. We discussed that. And it's my understanding that he's kind of gone on the lam and not going to appear. He does live in Pennsylvania.

However, since the start of the trial, I've also learned that, apparently, there were phone calls and communications between [Alice's mother] and Matthew Hardwick regarding his appearance and possible testimony at trial. I don't know exactly what was said, but I know that there were conversations that occurred. And I would like an opportunity, outside the presence of the jury, to voir dire [Alice's mother] as to what was or was not said in those conversations. And I've - -

Court: Okay

* * * * *

Court: What is your offer of proof here?

Trial Counsel: Well, what I had discussed earlier, Your Honor, is that, apparently, there was some conversation about Matthew appearing at trial, and she had relayed some information - - I was under the impression it was to Matthew directly, but, apparently, it was to Matthew's mother and the defendant's mother about his appearance at trial and if he shows up, he's going to get locked up or arrested, and things like that. And just for the record, Matthew Hardwick has been interviewed by the State by Detective Rubin. I've actually listened to the recording of that. He's also been interviewed by my investigator, and he denies any sexual acts with either victim in this case.

As I previously stated, he is in Pennsylvania. He was given a subpoena….

Trial Transcript dated May 29, 2008 pp. 11-12; 67-68; and 112-113.

[21] 11 *Del. C.* §3523.

noted, there was no reason to believe the State would call Matthew and that trial counsel was misled into believing it would call him.[22]

Trial counsel was aware that Matthew denied having any kind of sexual activity with either Peggy or Alice. He had listened to the police interrogation of Matthew during which he denied everything. He knew Alice denied Matthew engaged in any sex acts with her. Yet because of Peggy's statements, he was concerned enough about Matthew's potential criminal involvement, he arranged beforehand to have separate counsel appointed for him. As the transcript shows, he had every expectation up until the end that Matthew would be brought to court by Hardwick's mother. While the Supreme Court did not have to reach the issue, it is just as likely that Matthew, upon advice of counsel, would have chosen not to testify as to testify.

For the reasons stated in the Supreme Court's opinion upholding this Court' decision not to give a "missing witness" instruction and for the reasons above, this Court finds there was no breach of any objective professional standard by trial counsel in not producing Matthew. Assuming there were, Hardwick cannot show prejudice. He cannot demonstrate how Matthew would have testified at all. There was a distinct probability Matthew would have chosen not to testify if he had appeared in Court. He has not presented any affirmation, such as by Matthew, that he would have.

---

[22] *Hardwick v. State*, 971 A.2d at 134.

Lacking a breach of a professional standard and unable to show prejudice, he has failed to meet his burden on this claim. Matthew's testimony, if he had testified, would probably not have changed the result of the trial. This claim of ineffectiveness relating to failure to produce alibi witnesses fails.[23]

Failure to Move to Suppress Recordings of His Phone Calls with Peggy

The Court recited the three phone conversations Peggy had with Hardwick in late August 2007.[24] These were the calls where Peggy set up a meeting with a Hardwick for the two of them to engage in sexual activity and for Hardwick to give a "lesson" to a "trusted" friend of Peggy's. The police recorded all three conversations, which was done with Peggy's parents' permission.

Not only did Hardwick in these conversations engage in sexually explicit talk and talk about what he, Peggy, and her "friend" were going to do, he made admissions about his prior sexual experiences with Peggy. Particularly, he referred to things they had done in Delaware City.

Hardwick says these recorded conversations should not have been admitted. His argument is several-fold. One is that use of the recording violates D.R.E. 1002. He fails

---

[23] *Ayers v. State*, 802 A.2d at 284 (Del. 2002).

[24] Supra p. 5.

to explain how. Another argument is based on *Atkins v. State*.[25] There were no transcripts placed in evidence or given as aids to the jury. The tape recordings of these calls were played. Again, there is no *Atkins* rule in play. These arguments are specious.

Another argument Hardwick advances is that the police recorded the conversations in violation of Delaware statutory law. Trial counsel indicated he examined 11 *Del. C.* § 2402(c)(4).[26] Based on the parents' consent, he saw no basis to challenge the admissibility of the tape recordings. He is correct.

Hardwick, however, raises a rambling series of alleged constitutional reasons for suppression. He seems to argue entrapment and coercion. One only has to listen to the conversations, as this Court and the jury did to appreciate how meritless those arguments are.[27] This claim of ineffectiveness fails. Even if counsel had presented some kind of motion to suppress, it would have been denied. Therefore, there can be no valid claim of ineffectiveness.[28]

---

[25] 523 A.2d 539 (Del. 1987)

[26] Lawful acts. – It is lawful:

For a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutions or laws of the United States, this State or any other state or any political subdivision of the United States or this or any other state.

[27] The Court must emphasize only listening to the actual recordings will do.

[28] *Johnson v. State*, 813 A.2d at 167.

Failure to Object or Contest that State Had Not Proven all Elements of Rape

Hardwick's argument here covers several grounds. First as to Alice, he says the State failed to prove he was in a "position of trust" to his step-daughter. In all nine counts involving Alice, that element of rape first degree was alleged. When instructed, this element was stated:

> 4. The defendant was in a position of trust, authority or supervision over (Alice Smith).
>
> * * * * *
>
> Within the meaning of this offense, "a person in a position of trust, authority or supervision" includes, but is not limited to family members, people with custodial or supervisory authority, teachers, instructors, coaches, babysitters, day care workers, and anyone else having direct contact with children through a school, church, or any religious, athletic or charitable organization, whether such person is compensated or acting as a volunteer.[29]

The definition given to the jury comes from the statute.[30] In addition, Alice testified Hardwick disciplined her and was more strict with her than her own mother.

Trial counsel was not ineffective for failing to move to dismiss the rape charges against him involving Alice.

Another of Hardwick's arguments is that trial counsel did not move to dismiss because force as an element was not charged and was not proven. This argument is devoid of merit. As the State correctly notes, under 11 *Del. C.* § 773(a)(6), "force" is not an element. The fact that a forty-five year old man argues this in connection with girls twelve and thirteen is beyond belief.

---

[29] Instructions to the Jury dated June 3, 2008.

[30] 11 *Del. C.* § 761(d).

Failure to Challenge Police Criminal Acts[31]

Hardwick argues that his trial counsel was ineffective because he failed to challenge what he asserts were violations of criminal statutes by the police. He lists various provision in the Criminal Code which he contends the police violated.[32] He claims trial counsel's Code of Ethics required him to challenge "official rectitude." As to the claim of violation of §§ 501, 502, 503, and 541, Hardwick overlooks § 542:

> Nothing in this subchapter shall apply to any law-enforcement officer or the officer's agent while acting in the lawful performance of duty.[33]

Section 432 relates to the affirmative defense of entrapment. As an affirmative defense it has to be proven by a preponderance of the evidence.[34] Hardwick's claim here is premised on the phone calls he and Peggy exchanged setting up the meeting at Peoples' Plaza. As noted above, one only has to listen to the actual conversation to understand how spurious this claim is. There was no evidence to show the State did anything to get Hardwick to do something he did not want to do and predisposed not to do.[35] Quite the contrary. He showed at the shopping center a week after Peggy's last conversation with

---

[31] Trial Counsel did not provide a response to this claim of ineffective assistance. It is unclear if he did not understand there was such a claim or somehow overlooked it. As the discussion show, Hardwick did make a claim of ineffective assistance on this ground.

[32] Hardwick cites 11 *Del. C.* 271, 432, 501, 502, 503, and 541.

[33] 11 *Del. C.* § 542.

[34] 11 *Del. C.* § 304.

[35] See *Harrison v. State*, 442 A.2d 1377, 1385 (Del. 1982).

him.

Section 271 governs liability for the conduct of another. The Court assumes Hardwick believes either Peggy or Det. Rubin should be criminally culpable because the detective set up the pretext call and drove Peggy to Peoples' Plaza. His claims it that trial counsel, therefore, should have, the Court assumes, sought an instruction under § 271 or somehow sought to have the two charges of attempted rape dismissed. Hardwick's claim is devoid of any legal or factual merit.

Failure to Challenge Constitutionality of Attempted Rape Charges

The claim here is that lacking an actual "victim" in Count 31 charging attempted rape second degree, there could be no constitutional basis for a charge. Peggy was the named victim in Count 30 charging the same offense.

Hardwick misses the point. Count 31 reads:

> COUNT 31. COUNT # N I08-03-1282
>
> ATTEMPTED RAPE SECOND DEGREE, in violation of Title 11, Section 531 of the Delaware code of 1974, as amended.
>
> JAMES HARDWICK, on or about the 5th day of September 2007, in the County of New Castle, State of Delaware, did intentionally attempt to have sexual intercourse with an unknown female, without her consent, which under the circumstances as he believed them to be constituted a substantial step in a course of conduct planned to culminate his commission of Rape Second Degree in violation of 11 Del. C. § 772.

He agreed to have some form of sexual intercourse with a fifteen year old female whom he insisted to Peggy had to be trusted. He was forty-nine years old at the time.

When arrested he had a condom in his left front pants pocket. He showed up at the pre-arranged date, time and place. The crime was "attempted" rape and the jury had to find all of the other evidence and the evidence of the calls and his presence, manifested as "substantial step." No actual person was needed. There is no "constitutional" basis on which trial counsel could have challenged Count 31. Any claim of ineffective assistance is unfounded. There was no "victim" to confront.

Failure to Pursue Client's Interests

When making a claim of ineffective assistance of counsel, a defendant is required to make specific and concrete allegations, not offer generalities.[36] The "catchline" for this claim is anything but concrete. But in the body of his argument, Hardwick attacks counsel's performance because he failed to challenge or address the issue of staleness. That is, the bulk of the conduct covered in Counts 1 - 29 of the indictment basically occurred in 2005. Yet the two young girls did not report what had happened for about two years.

Trial counsel did bring out, as had the State's own evidence, that there was a delay in reporting. In his closing remarks, trial counsel also commented about the delay, particularly in Alice's case. His argument was in large part premised on defense testimony that in September 2005, which apparently had been just after the bulk of the sexual acts had occurred, Alice was questioned by a Division of Family Services worker. That

[36] *Stone v. State*, 690 A.2d 924, 925 (Del. 1996).

worker was a defense witness who was investigating a non-sex related complaint which Alice had made against Hardwick. Alice did not mention the sexual encounters when interviewed. The complaint went nowhere.[37]

Trial counsel noted all of this in his closing, as well as Alice's testimony about why she did not report it to the DFS worker or at any time until the summer of 2007.[38] He also argued to the jury about how time had seemed to "alter" Peggy's memory and her varying versions of events.

Hardwick's claim here is deficient for two reasons. First, he failed to be as specific as he must about what more trial counsel could have done. Second, Hardwick makes an all-too-general claim that but for trial counsel's failure to pursue the late reporting issue, the trial result would have been different. This type of broad brushed swipe is inadequate to meet the prejudice standard and he has certainly failed to demonstrate how counsel was defective.

In short, this claim of ineffectiveness lack merit.

Failure of Counsel to Challenge Search Warrant

After he was arrested, the police obtained a warrant to search the house where Hardwick lived with Alice and her mother up until the day of his arrest on September 5,

---

[37] Hardwick made a passing reference in his motion to trial counsel's failure to produce DFS workers who determined Alice's complaint was found groundless. That result was obvious from the DFS worker whom trial counsel called as a defense witness.

[38] Trial transcript June 3, 2009, pp. 42-43, 46, and 48.

2007. The police were looking for the dog cage in which the initial sex acts had occurred and for the Playboy magazines which he showed the girls before those sex acts started. No Playboys were recovered but the police photographed the dog cage. Two photos taken of it were admitted into evidence without defense objection.[39]

There had been no pre-trial or at-trial motion to suppress. Hardwick claims items were seized which were not listed as items to be sought or seized under the search warrant. If there were such items, they were not introduced or mentioned in the trial. He asserts he told trial counsel about all of this. Trial counsel replies he examined the search warrant and found no basis to challenge it.

As counsel did, this Court has examined a copy of the warrant. It more than makes a case for probable cause. Trial counsel was not ineffective for failing to challenge it.

Summary

In this "claim" Hardwick restates several of his claims which are reviewed above and takes the time to add several others. For completeness, the Court will list them but will not re-address those claims reviewed earlier:

1. Failure to investigate victims' access to facts. (Hardwick specifies nothing else when making this claim.) The Court, since he made a series of more specific claims which were considered above, is not required to inquire further. This claims lacks specificity as to any deficiency or prejudice.

[39] State's Exhibit 5 and 6.

2. Failure to investigate the lack of any kind of medical or psychological testing. This claim, too, lacks requisite specificity. Det. Rubin testified that after two years, any DNA testing or rape kit testing would have served no purpose. Hardwick does not say what such testing would have done or what kind of testing he believes should have been done. This claim lacks merit.

3. Failure to investigate (if) the phone calls were his. Again, this claim is too broad. He does not indicate what phone calls he is talking about. If he is referring to the calls between him and Peggy to set up the meet at Peoples' Plaza, this claim is devoid of merit. First, the cell phone seized from him at that location had the number Peggy called. Second, Alice's mother and Hardwick's wife of over three plus years said it was his voice. Third, Peggy's own testimony confirmed all of this. There is no need to say more.

4. Failure to use any expert witnesses or witnesses with favorable testimony. There were no expert witnesses for either side in this case. Hardwick does not identify (1) what kind of expertise he wants/wanted/or was needed or (2) what kind of opinions any such expert would offer. The State's use of expert witnesses in child sex cases is very limited.[40] Expert witnesses are not permitted

[40] *Wheat v. State*, 527 A.2d 269 (Del. 1987).

to opine regarding credibility.[41] For all these reasons this claim lacks merit.

5. Failure to challenge truthfulness of allegations. This claim is repetitive and surplusage deserving no further discussion.

6. Failure to challenge State's evidence. This claims lacks specifics of deficiency and/or was addressed in detail earlier in this opinion, and lacks merit.

7. Failure to provide any defense. Hardwick, in turn, fails to say what defenses should have been offered. Trial counsel presented the DFS worker who interviewed Alice a short period after much of the sexual activities to show Alice could have but did not report those activities. A lot more was brought out on cross-examination of the State's witnesses such as the delay in reporting, etc. However, lacking the necessary specifics and to the extent earlier discussion covered this ground, the claim lack merit.

8. Failure to use compulsory process to produce alibi witness. This claim has been discussed and rejected earlier.[42]

9. Failure to ask "exculpatory" questions of the State's witnesses which he asked trial counsel to ask. Hardwick fails to mention any such question. He has shown that he is more than capable of being specific, but on this claim he presents nothing. The Court views his approach, therefore, to be an intentional failure to make an ineffective assistance of counsel claim.

---

[41] See *Condon v. State*, 597 A.2d 7, 10 (Del. 1991).

[42] *Supra* pp. 10 - 13.

Under this claim Hardwick speaks again of exculpatory witnesses not called. He lists his mother as a witness who testified about Alice lying. He does not say he gave her name to trial counsel prior to trial or what "instances" of "lying" to which he refers. Absent some information about that, it is impossible to know that possible testimony would have been admissible. It is likely any such testimony would have been inadmissible.

The other "exculpatory" witness Hardwick mentions is the DFS worker who investigated the (physical) abuse complaint involving Alice made. It was obvious nothing came of that complaint.

Hardwick has failed to demonstrate attorney deficiency or prejudice. This claim lacks merit.

10. Failure to pursue speedy trial issue. This claim is barred for two reasons. First, it was not, but could have been raised on direct appeal. Second, Hardwick went to trial 192 days after his indictment.[43]

III

The State responded to Hardwick's motion, and, as entitled, he responded to its response.[44]

---

[43] He was re-indicted but with only slight changes.

[44] Super. Ct. Crim. R. 61(f)(3).

Before turning to Hardwick's response, there are two issues worth noting. First, Hardwick has requested copies of the trial transcripts. However, on appeal and in the postconviction proceedings in this Court, he has been represented by counsel. They have the transcripts and he knows it. Nor has Hardwick himself ever told the Court why he needs them, even though requested to do so. Hardwick's motion and his *pro se* responses fail to provide a basis for this request;[45] they are detailed where he chooses to be detailed and having a transcript would not help his claim. Where he has chosen to be vague or too general, it is not for lack of a transcript. The Court remains unconvinced Hardwick needs transcripts.

Related to the transcript issue, is that Hardwick's July 10, 2010, response to the State's reply to his motion was made *pro se*.[46] Since November 9, 2009, Hardwick has been represented by contract counsel. There is no such thing as "hybrid" counsel.[47] On January 21, 2011, appointed counsel wrote the Court that, after consultation with Hardwick, he was not adding or modifying anything. He also said he gave Hardwick copies of the trial transcripts. Nothing more has been filed since.

---

[45] He did at one point ask for the transcript showing the voir dire asked. See discussion *infra*, ¶ 11.

[46] The State's reply was given unsolicited to the Court.

[47] See *Merritt v. State*, 2011 WL 285097 (Del.) (ORDER); *In re: Haskins*, 551 A.2d 65 (Del. 1988).

Thought he had responded (*pro se*) to trial counsel's affidavit, Hardwick chooses to add to that response and at the same time offers a list of alleged transgressions in representation as "Some Errors" made by counsel:[48]

1. Held fourteen hours from arrest to initial booking; unreasonable delay; counsel did nothing. This claim is barred. It could and should have been raised on the direct appeal and was not. Nor does the record reflect any evidence was presented at trial as a result of the fourteen hours he claims. Hardwick has offered nothing to show cause for it not being so nor any prejudice to overcome that procedural bar.[49]
2. Police ransacked his house during execution of the warrant. This claim is not subject for a motion for postconviction relief.
3. Failure to move to suppress. This claim has been considered and rejected.[50] Now Hardwick seeks to wrap this claim and others in a conflict of interest claim against trial counsel. It will not work.
4. The same comments apply to his renewed, re-packaged claim of failure to ask "helpful" questions.[51]

---

[48] Petitioner's response p. 3.

[49] Super. Ct. Cr. R. 61(i)(3).

[50] *Supra* p. 13.

[51] *Supra* p. 15

5. Failure to subpoena witnesses. Nothing new.

6. Failure to challenge "faulty" indictment; not all elements of rape were alleged. A re-packaged claim already considered and rejected.[52]

7. Same claim. Same answer.

8. Trial counsel refused to challenge girls' contradictory statements. Reference to trial transcript of June 3, 2008, pp. 42-43, during which, as an example, trial counsel argued this very point to the jury belies this claim.

9. Counsel failed to investigate girls' reputations. What reputations? They were twelve and thirteen when he raped them. This claim is not worth anything.

10. Trial counsel accepted State's version of events. A reading of the trial transcript totally undercuts this claim.

11. Failure of trial counsel to ask for voir dire of prospective jurors. This claim borders on the ridiculous and is denied. In addition to the Court's standard questions, trial counsel asked the Court to ask eight special questions of which only one, question #5, was not asked.[53]

> 1. Do you feel that the serious nature and large number of charges against the defendant may effect your ability to render a fair and impartial verdict?

---

[52] *Supra* p. 17.

[53] Hardwick points to the jury foreman becoming emotional while announcing the verdicts. The Court has no recollection of such and if it did, that would be a reflection the Court views such a reaction as requiring further inquiry. The Court is more than satisfied that the jury, as instructed, decided this case on the evidence not sympathy.

2. Do you believe that a defendant who does not testify at his or her trial is most likely guilty?

3. Are you or any of your friends or family a current or former police officer, probation officer or other type of law enforcement officer?

4. Do you believe that people who commit crimes of a sexual nature are more dangerous than people who commit crimes of a non-sexual nature?

5. Do you believe that any type of sexual relations outside of marriage, even if between consenting adults, is morally wrong? Not asked.

6. Do you believe that any type of "unnatural sex," for example, anal or oral sex, even between consenting adults, is morally wrong?

7. Have you or any friends or family ever been accused of a crime that is sexual in nature?

8. Have you or any friends or family ever worked with individuals or groups that aid, counsel or advocate for victims of sexual crimes?

12. Failure to move to suppress statements Hardwick made. No such statements were introduced at trial.

13. Failure to challenge the need for an actual victim in the attempted rape charge involving the fifteen-year-old already considered and rejected.[54]

14. Failure to gather mitigating evidence for penalty phase. Hardwick overlooks the statutory fact that his prior conviction for raping another step-daughter mandated a life sentence for each of the twenty-nine counts of rape first degree. The same statute mandated a sentence of twenty-five years to life for the two convictions

[54] *Supra* pp. 17 - 18.

of attempted rape second.[55] The Court believed and believes a life sentence for those two charges was appropriate. Hardwick, more than anyone, would be in possession of whatever mitigating information he claims counsel should have found. But he has failed to supply any - even now. This claim rings hollow.

15. Counsel made little effort to cross-examine Alice and Peggy. A review of the trial transcript fully rebuts this claim. The DFS testimony and testimony that Hardwick was more of a disciplinarian on Alice than her own mother renders this claim, too, as hollow.

16. Hardwick did not ask appellate counsel to represent him. Appellate counsel was not the same as trial counsel. Hardwick was and is indigent. He was represented at trial and on appeal by the Office of the Public Defender. He has no choice in the matter.[56]

17. Hardwick cites Supreme Court Rule 12(b) for authority that trial counsel never asked that court to be relieved as counsel for the appeal. Because of the Public Defender's continuing representation of him, trial counsel did not have to.

18. Appellate counsel was ineffective for failure to raise certain issues. He claims whatever those issues are, they are cited in his memorandum of law. But he neglects to be specific and neglects to demonstrate how appellate counsel was

---

[55] 11 *Del. C* § 4205A.

[56] *Moore v. State*, 268 A.2d 875, 876 (Del. 1970).

ineffective, if at all. At various parts of this decision the Court has noted several issues which Hardwick did not raise on appeal, such as, his attack on the Court's credibility instruction.[57] These appear to be issues he asserts appellate counsel did not raise. As to these and any other issue he contends where he received ineffective assistance of appellate counsel, appellate counsel is entitled to argue those positions which are more likely to prevail.[58] He has not shown how his convictions would have been reversed if those issues had been raised.

19. Conflict of interest. Hardwick claims this equates to ineffective assistance. His argument is circular. By failing to move to suppress, not present alibi witness, etc., trial counsel violated various rules of professional conduct. The Court has considered and rejected all of these threshold ineffective claims. It need not go to the claims of professional rules violation. This claim is groundless.

III

The length of this opinion has been necessary for several reasons. First, Hardwick has made a number of claims. To the extent possible, the Court has sought to carefully address them. Where detailed enough, the Court has endeavored to be as detailed if not more so. There were some claims, however, which were devoid of merit on their face. Second, the charges for which Hardwick was convicted are particularly serious and the sentences imposed are the second most serious in our jurisprudence.

---

[57] *Supra* p. 8.

[58] *Flamer v. State*, 585 A.2d 736, 758 (Del. 1990).

Conclusion

For the reasons stated herein, James Hardwick's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

_____

J.